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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC.
and LITTON INDUSTRIES, INC.,

Petitioners

v.

GENERAL ELECTRIC COMPANY,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Litton respectfully submits this Reply Brief[1] in response to GE's arguments concerning the nationally significant attorneys' fee question which has divided the federal courts.[2]

Since Congress required only a few plain words to express its clear intention to create a right to attorneys' fees in Sections 104(b) and 310 of CERCLA, the fact that GE, after several pages of strained analysis, cannot identify *any* statutory language that *explicitly* permits fee-shifting in Section 107(a) private party cost recovery actions, totally vitiates its principal argument that there is "clear textual authorization" for the Eighth Circuit's award of attorneys' fees (GE Brief, at pp. 9-12). GE cannot avoid the ineluctable conclusion that if Congress had intended to create a right to attorneys' fees on behalf of Section 107(a) private parties, it would have used the same direct and explicit language it employed in Sections 104(b) and 310.

In stark contrast to those express provisions, Section 101(25), the linchpin of GE's argument and the Eighth Circuit's holding, does not even mention attorneys' fees. This conspicuous omission is conclusive proof that Congress did *not* intend to

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1. Given the limitations applicable to reply briefs, Litton cannot here address all of the errors which pervade GE's arguments on the "removal action/remedial action" question. However, it is hardly "disingenuous" (GE Brief, at p. 8) for Litton to advocate adherence to the public participation and cost-effectiveness requirements of CERCLA which are designed to prevent unnecessarily expensive unilateral cleanups of the type performed here, which even GE concedes was non-emergent and not ordered by any regulatory authority. The fact that public participation requirements have been augmented in the 1990 NCP does not make the "removal action/remedial action" legal question less worthy of review (GE Brief, at p. 8 n. 4), but rather accentuates its importance and the continued need for this Court's guidance. Litton, therefore, will rest on the arguments asserted in its Petition.

2. The legal press has continued to focus on the Eighth Circuit's controversial ruling. *See Haz. Waste Lit. Rep.* (Andrews), at 20,490 (Feb. 18, 1991) (entire Petition for Certiorari reproduced); *Env't Rep.* (BNA), vol. 21, no. 42, at 1845 (Feb. 15, 1991); *Fed. Cont. Rep.* (BNA), vol. 55, no. 7, at 233 (Feb. 18, 1991); *Toxics L. Rep.* (BNA), vol. 5, no. 37, at 1171-72 (Feb. 20, 1991); *Inside EPA, Superfund Rep.* (Inside Wash. Pub.?, vol. V, no. 5, at 3 (Feb. 27, 1991) (lead article); *Lit. Rep.: Superfund* (Mealey), vol. 3, issue 22, at 8 (Feb. 27, 1991) (entire Petition for Certiorari reproduced); *The American Lawyer*, vol. XIII, no. 2, at 35 (March 1991).

permit fee-shifting in cases such as this because (a) Congress knew when it enacted CERCLA in 1980 that legislative authorization to depart from the established American rule and award attorneys' fees to the prevailing party was required to be "explicit", *Runyon v. McCrary*, 427 U.S. 160, 185 (1976), (b) Congress explicitly created in Section 104(b) a right for the United States to recover its attorneys' fees and (c) Congress, in amending CERCLA in 1986, created Section 310 with its explicit fee-shifting provisions *at the very same time* it added the general undefined term "enforcement activities" to Section 101(25).

Because Congress did not expressly create a right to attorneys' fees in connection with Section 107(a) private party cost recovery actions, the fact that it placed the term "enforcement activities" in a general definitional section of CERCLA is irrelevant here and cannot confer on GE statutory rights which Congress did not explicitly create or intend.[3] Since Sections 104(b) and 310 of CERCLA *expressly* create a specific right to attorneys' fees, controlling principles of statutory construction prohibit the general term "enforcement activities" from being used as a vehicle for implying the same right to attorneys' fees that Congress explicitly created elsewhere in the same statute. *See National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

GE's alleged case support for its "textual clarity" argument is equally illusory and unpersuasive. Its so-called leading case,

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3. Contrary to GE's contentions (GE Brief, at p. 10), the statement in H.R. Rep. No. 253 that the addition of "enforcement activities" was intended to confirm *EPA's* authority to recover enforcement costs is not inconsistent with the term's placement in a section potentially applicable to both governmental and private parties. The 1986 amendment to Section 101(25) dispelled previous confusion as to whether EPA could recover its enforcement (as distinct from response) costs. The 1986 amendments also conferred on private parties, for the first time, a right to "enforce" CERCLA through Section 310 citizens' suits. Ultimately, however, the issue pressed by GE is a red herring: since Congress did not explicitly create a right to attorneys' fees in adding the term "enforcement activities" to Section 101(25), it does not matter for purposes of the present case where Congress placed the term or why it was placed there.

Pease & Curren Refining, Inc. v. Spectrolab, Inc., 744 F. Supp. 945 (C.D. Cal. 1990), states just the opposite of the proposition for which it is cited:

> "*CERCLA does not . . . expressly discuss the award of attorney's fees to a private party* [in a Section 107(a) cost recovery action] . . . . [T]his court's interpretation of CERCLA is predominately guided by congressional intent . . . . Unfortunately . . . , '*CERCLA is not a paradigm of clarity* or precision. It has been criticized frequently for unartful drafting and numerous ambiguities . . . . Problems of interpretation have arisen from the Act's use of *inadequately defined terms, a difficulty particularly apparent in the response costs area.*' " *Id.* at 950 (emphasis added; citations omitted).

The *Pease & Curren* court's conclusion that attorneys' fees should nevertheless be awarded because Congress "implicitly" provided for them even if it did not do so expressly, *id.*, amounted to impermissible judicial legislation which is irreconcilably at odds with this Court's mandate that there must be "*explicit*" congressional authorization for fee-shifting. *Runyon v. McCrary, supra.*

The only other attorneys' fee case cited by GE, *Shapiro v. Alexanderson*, 741 F. Supp. 472 (S.D.N.Y. 1990), was overruled *sub silentio* by the very judge who authored it just six months after it was decided. In *State of New York v. SCA Services, Inc.*, No. 83 Civ. 6402 (S.D.N.Y. Jan. 9, 1991), Judge Patterson, acknowledging "[t]he *prevailing rule* . . . that attorneys' fees are *not* recoverable as response costs in actions under §107 of CERCLA brought by private litigants" (emphasis added), held in direct contradiction of his earlier decision in *Shapiro* that CERCLA does not provide sufficient statutory authority to award attorneys' fees to a Section 107(a) private party.

In short, GE's analysis is fatally flawed because it divorces Section 101(25) from the rest of the statutory scheme and totally ignores Congress' express creation of fee-shifting rights in

Sections 104(b) and 310.[4] However, as this Court instructed in *United States Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988), statutory language cannot be construed in a vacuum:

> "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law . . . ." *Id.* at 371.

GE's myopic construction of the term "enforcement activities" produces a result that cannot be harmonized with other key provisions of CERCLA. Indeed, if, as GE argues, Congress implicitly intended to create a broad right to attorneys' fees by adding the general undefined term "enforcement activities" to Section 101(25), there would have been no need for Congress *simultaneously* to have created *explicitly* in Section 310 of the *same* statute a *duplicative* right to attorneys' fees. Because GE's hermetic reading of Section 101(25) would render superfluous the *express* fee-shifting language in Section 310, it must be rejected. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) (where a "statute admits a reasonable construction which gives effect to all of its provisions . . . we will not adopt a strained reading which renders one part a mere redundancy"). By contrast, Litton's holistic interpretation is consistent with

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4. The question is not, as GE urges, whether there is anything "inherent" in the phrase "enforcement activities" which would prevent the judicial creation of a right to attorneys' fees (GE Brief, at p. 11), but rather whether there is "*explicit*" congressional authorization for fee-shifting *in the statute*. That two Ninth Circuit non-attorneys' fee cases happen to have used the term "enforcement" in *dicta* in reference to private party cost recovery actions (GE Brief, at p. 11) is not evidence of what Congress intended. What is relevant is that when Congress, mindful of this Court's directive that fee-shifting must be accomplished explicitly, added the undefined term "enforcement activities" to CERCLA in 1986, it also added Section 310 with its *express* fee-shifting language.

both the legislative history[5] and the language of CERCLA, including Section 310.

Given the exceptional importance of the attorneys' fee issue in all substantive legal areas and the confusion this issue has generated among the district courts and between the majority of the district courts and the Eighth Circuit, the granting of certiorari will not, as GE suggests, be premature. As this Court has recognized in analogous circumstances, there is no reason to delay review until another court of appeals enters the fray, as it inevitably will. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 n.14 (1981); *Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974).

Respectfully submitted,

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5. GE argues that H.R. Rep. No. 253, cited by Litton, is "irrelevant" because it "was attached to a bill that did *not* become law, H.R. 2817 . . . and the conference report to the bill which did become law has no such EPA-restricted language". (GE Brief, at p. 10 n. 7). However, while House Bill 2817 was superseded, it introduced the term "enforcement activities" that was reiterated in the subsequently enacted bill, and the comments concerning that term contained in the conference report to the bill which became law are not inconsistent with those contained in H.R. Rep. No. 253. Even GE's leading case, *Pease & Curren*, treats H.R. Rep. No. 253 as relevant evidence of congressional intent. 744 F. Supp. at 951.